

November 24, 2003

Kenneth K. Fukunaga, Esquire  
Fukunaga, Matayoshi, Hershey & Kuriyama  
Grosvenor Center, Mauka Tower  
737 Bishop Street, Suite 2890  
Honolulu, Hawaii 96813

Dear Mr. Fukunaga:

Re: List of Prospective Employees of Mercy Ambulance  
Service Submitted to DAGS in Response to an Invitation  
for Bid

Your letter to Attorney General Robert A. Marks dated May 25, 1993, which raises an issue concerning the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA"), has been forwarded to the Office of Information Practices ("OIP") for a reply in accordance with an established departmental protocol.

Your firm represents Mercy Ambulance Service Hawaii, Inc. ("Mercy"), the successful bidder under Steps 1 and 2 of Invitation for Bid No. F-93-260-M ("IFB") for emergency medical services for the County of Maui. This IFB was issued by the Department of Accounting and General Services ("DAGS"), on behalf of the State Department of Health ("DOH"), the contracting agency.

In your letter to Attorney General Robert A. Marks, you requested the Attorney General to make a determination that a list identifying individuals who have applied for positions with Mercy as qualified Mobile Intensive Care Technicians ("MICTs") and Emergency Medical Technicians ("EMTs"), and other personnel positions, be kept confidential until the effective date of the contract, October 1, 1993, rather than upon the list's due date, June 2, 1993. This list was submitted as part of Step 3 of a three step bidding process under the IFB.

The OIP shall treat your letter dated May 25, 1993 as a request for an advisory opinion under section 92F-42(3), Hawaii

OIP Op. Ltr. No. 93-5

Revised Statutes.

### **ISSUE PRESENTED**

Whether, under the UIPA, DAGS or the DOH must make available for public inspection and copying a list submitted to it by Mercy pursuant to Step 3 of an IFB for a contract to furnish emergency medical services for the County of Maui, which list contains the names of qualified MICTs and EMTs who will be employed by Mercy and perform emergency medical services.

### **BRIEF ANSWER**

"Any provision to the contrary notwithstanding," each State and county agency subject the UIPA must disclose "[g]overnment purchasing information, including all bid results, except to the extent prohibited by section 92F-13." Haw. Rev. Stat. 92F-12(a)(3) (Supp. 1992).

It is our opinion that the list of MICTs and EMTs submitted by Mercy to DAGS constitutes "government purchasing information," since its submission was required under Step 3 of DAGS' IFB for emergency medical services.

Additionally, we conclude that under the facts presented, none of the exceptions in section 92F-13, Hawaii Revised Statutes, would permit DAGS to withhold Mercy's list from public inspection and copying. Specifically, for the reasons discussed below, it is our opinion that disclosure of the list would not constitute a "clearly unwarranted invasion of personal privacy" under the UIPA because under section 92F-14(a), Hawaii Revised Statutes, the public interest in disclosure outweighs the personal privacy interests of individuals whose names appear on the list.

Further, for the reasons detailed below, the OIP does not believe that the list submitted by Mercy is a government record that, by its nature, "must be confidential in order to avoid the frustration of a legitimate government function." Haw. Rev. Stat. 92F-13(3) (Supp. 1992).

Because we find that none of the other exceptions in section 92F-13, Hawaii Revised Statutes, permit DAGS or the DOH to withhold the list, we conclude that the list must be made available for inspection and copying "upon request by any person." Haw. Rev. Stat. 92F-11(b) (Supp. 1992).

### **FACTS**

On April 6, 1993, DAGS issued a three step IFB on behalf of the DOH, the contracting agency, for a contract to supply emergency medical services for the County of Maui. Three bids were received by the April 30, 1993 deadline set forth in the IFB. Bids were submitted by Mercy, International Life Support ("ILS"), and National Medical Transportation Network, Inc., dba MedTrans. Under Step 1 of the IFB evaluation, a five member evaluation committee reviewed the materials submitted by each company under criteria specified in the IFB. After the review, ILS, the current emergency medical services provider, received 100 points, Mercy received 98 points, and MedTrans received 84 points.

According to your letter, in Step 2 of the IFB evaluation process, the bid prices were evaluated in relationship to the points received such that the bid price of each bidder was increased by 1% for every point under 100 points assigned to the bidder. Mercy emerged as the lowest responsible bidder under Step 2 with an evaluated bid price of \$14,274,061, and received notice on May 12, 1993 to proceed to Step 3.<sup>1</sup>

Step 3 of the IFB bid evaluation process is described by documents provided to the OIP by DAGS, in part, as follows:

Step 3: The bidder who emerges successful under Steps 1 and 2 shall submit a complete list of names and qualifications of all employees proposed to work under this contract, as described in Specifications, Section II-B, PERSONNEL, Parts 1, 2, & 3. In addition to the physician and key manager, this list shall include names of at least twenty three (23) State of Hawaii certified EMTs and at least twenty three (23) State of Hawaii certified MICTs. In the event that the bidder is unable to meet this requirement, his bid will be automatically rejected.

IFB No. F-93-260-M, Special Provisions, at SP-11 (rev. April 20, 1993). Mercy was required to submit this list on or before June 2, 1993.

---

<sup>1</sup>ILS's evaluated bid price was \$14,717,925, or \$443,864 more than the lowest evaluated bid.

In your letter to the Attorney General, you stated that Mercy believes that Step 3 is being used by the current emergency services provider, ILS, to prevent Mercy from being awarded the contract to supply emergency medical services to the County of Maui. You believe that documents attached to your letter to the Attorney General demonstrate that via telephone and telefax, efforts have been made to discourage paramedics on Oahu and the Big Island from working for Mercy. You also state that Mercy has been informed by ILS paramedics that there have been "threats of termination" and "verbal intimidation" calculated to convince ILS employees not to accept Mercy's offer of employment.

In accordance with the IFB, Mercy submitted a list containing the names of 32 MICTs and 32 EMTs, and their qualifications, to DAGS on June 2, 1993. Emergency medical services under the new contract are not scheduled to begin until October of 1993. Mercy believes that if the list of qualified employees it submitted to DAGS is made available for public inspection before the effective date of the contract, October 1, 1993, employees currently employed by ILS, either in the Counties of Maui, Oahu, or Kauai will be deterred from applying for positions with Mercy. Mercy further believes that if the names of these individuals are publicly disclosed, these individuals may be subject to adverse employment action by their current employer, ILS.

In a letter to the DOH dated June 2, 1993 from Alan S. Konishi, attorney for ILS, ILS requested that a copy of Mercy's list of EMTs and MICTs be made available for its inspection and copying.

## **DISCUSSION**

### **I. INTRODUCTION**

The UIPA states that "[e]xcept as provided in section 92F-13, each agency shall make government records available for inspection and copying upon request by any person." Haw. Rev. Stat. 92F-11(b) (Supp. 1992). The term "government record" means "information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. 92F-3 (Supp. 1993); Kaapu v. Aloha Tower Development Corp., \_\_\_ Haw. \_\_\_, No. 15775 (Feb. 25, 1993).

### **II. GOVERNMENT PURCHASING INFORMATION AND BID DOCUMENTS**

Section 92F-12(a)(3), Hawaii Revised Statutes, requires, any provision to the contrary notwithstanding, that each agency shall

make available for public inspection and copying during regular business hours "[g]overnment purchasing information, including all bid results, except to the extent prohibited by section 92F-13." In OIP Opinion Letter No. 91-14 at 4-6 (Aug. 28, 1991), we noted that this provision was included in the UIPA largely as a result of recommendations set forth in Vol. I Report of the Governor's Committee on Public Records and Privacy (1987)<sup>2</sup> which underscored the substantial public interest in the disclosure of information concerning "bid documents and results," and in "government purchasing information":

The next issue raised was the availability of bid documents and results. There was however, very little dispute over this issue. It is agreed that the documents and results are available though not until the time of the award since the premature release of information might undermine the purpose of the bid process. See Comptroller Russel Nagata (II at 13) and Honolulu Managing Director Jeremy Harris (II at 116). Both also noted that even after award, there may be some material that should remain confidential either because it involves trade secrets (Nagata and Harris) or personal information (Harris). As Harris noted, however, the burden is on the bidder to establish that any material should be confidential.

Also raised was the availability of government spending information. The basic thrust is that anytime taxpayer money is spent, the taxpayers have a right to see how it was spent. See Joseph Bazemore, Hawaii Building and Construction Trades Council, AFL-CIO (II at 199 and I(H) at 35-37). See also Kelly Aver (I(H) at 2), who felt such information should be available to monitor abuse. To some degree, this is covered by

---

<sup>2</sup>When the Legislature adopted the UIPA, it acknowledged the "herculean efforts" of the Governor's Committee on Public Records and Privacy, and the important role that its recommendations played in drafting the UIPA. See S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

issues discussed above under such headings as government employees, public works, and bid results. There is also, however, a desire to ensure that all State and county purchasing information is available. See James Wallace (I(H) at 16-17). As a Committee member put it: "Government should never stop short of complete openness in this area." If for no other reason, taxpayers need the assurance of knowing that this information is accessible.

Moreover, it is unlikely that personal information should be much of a concern and vendors who do business with the State should not have an expectation of privacy as to that sale.

Vol. I Report of the Governor's Committee on Public Records and Privacy, 114 (1987) (emphases in original).

In our opinion, the list of employees submitted by Mercy to DAGS constitutes "government purchasing information" within the meaning of section 92F-12(a)(3), Hawaii Revised Statutes. As part of Step 3 of the IFB, Mercy was required to submit this document to DAGS, or its bid would be automatically rejected. The list is an integral part of DAGS' bidding process for emergency ambulance services.

Only two exceptions in section 92F-13, Hawaii Revised Statutes, would arguably permit DAGS to withhold the list submitted by Mercy from public inspection and copying upon request. We now turn to an examination of these exceptions.

### III. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

Section 92F-13(1), Hawaii Revised Statutes, provides that an agency is not required to disclose "[g]overnment records, which if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Under the UIPA, the "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. 92F-13(1) (Supp. 1992).<sup>3</sup>

---

<sup>3</sup>See also, Haw. Rev. Stat. § 92F-2 (Supp. 1992) (one of UIPA's purposes is to "[b]alance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy").

Under this balancing test, "if a privacy interest is not 'significant,' a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." H. Conf. Comm. Rep. No. 112-88, 14th Leg., 1988 Reg. Sess., Haw. H.J. 817, 818 (1988); S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988). Indeed, the legislative history of the UIPA's privacy exception indicates that it only applies if an individual's privacy interest is significant. See id. ("[o]nce a significant privacy interest is found, the privacy interest will be balanced against the public interest in disclosure").

In OIP Opinion Letter No. 90-15 at 8 (April 9, 1990) we stated that "[w]e have serious doubts concerning whether section 92F-12(a)(3), Hawaii Revised Statutes, was intended to permit agencies to withhold information under the UIPA's privacy exception," noting that the Governor's Committee on Public Records and Privacy observed that vendors who do business with the State should not have an expectation of privacy as to that sale.

It is also a rarity that bid documents or government purchasing information contain information in which an individual<sup>4</sup> has a significant privacy interest. Nevertheless, we shall examine whether, under section 92F-13(1), Hawaii Revised Statutes, the disclosure of the names of individuals who appear on the list submitted to DAGS by Mercy would constitute a clearly unwarranted invasion of personal privacy under the UIPA.

#### A. Existence of Significant Privacy Interest

Your May 25, 1993 letter to Attorney General Robert A. Marks indicates that "Mercy has promised confidentiality in its employment agreement with the current Maui County workforce." Mercy asserts that Mercy applicants have a significant privacy interest in this personnel related information.<sup>5</sup>

---

<sup>4</sup>Only "individuals" have cognizable personal privacy interests under the UIPA. Under the UIPA, the term "individual" means a "natural person." Haw. Rev. Stat. § 92F-3 (Supp. 1992). Thus, as a corporate entity, Mercy does not have a significant personal privacy interest in information submitted to DAGS. See generally OIP Op. Ltr. No. 92-17 (Sept. 2, 1992) (disclosure of information regarding the Hawaii Visitors Bureau found not to constitute a clearly unwarranted invasion of personal privacy).

<sup>5</sup>By analogy, see, e.g., Haw. Rev. Stat. § 92F-14(b)(4) and (5)

While we have serious reservations about whether Mercy applicants have a significant privacy interest in the fact that their names appear on the list, for purposes of this opinion we shall assume that individuals who have applied for positions as MICTs and EMTs with Mercy have a significant privacy interest in this fact.

B. Application of UIPA's Public Interest Balancing Test

As stated above, the UIPA provides that the disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual. Haw. Rev. Stat. 92F-2 and 92F-14(a) (Supp. 1992).

The federal Freedom of Information Act, 5 U.S.C. 552 (1988) ("FOIA") also uses this public interest balancing test for determining the applicability of FOIA's clearly unwarranted invasion of privacy exemption, FOIA's Exemption 6. The U.S. Supreme Court has held that in assaying the "public interest," it is necessary to examine "the nature of the requested document and its relationship to 'the basic purpose of FOIA to open agency action to the light of public scrutiny.'" U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

The Court also reasoned that the "public interest" to be considered is the public interest in the disclosure of information that "sheds light on an agency's performance of its duties," or that informs the public "what their government is up to." Reporters Committee, 489 U.S. 773. The Court went on to state:

That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct. In this case--and presumably in the typical case in which one private citizen is seeking information about another--the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed light upon any Government agency or official.

---

(Supp. 1992).



Reporters Committee, 489 U.S. 773 (emphases added).

The U.S. Supreme Court has also described the purpose of the FOIA as follows:

The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

In applying the UIPA's public interest balancing test, we believe that it must also be applied in light of the policies that underlie the UIPA, which include the "[e]nhancement of governmental accountability through a general policy of access to government records" and promoting the public interest in disclosure. Haw. Rev. Stat. 92F-2 (Supp. 1992).

We believe that there is a considerable public interest in the disclosure of the list of individuals that Mercy has submitted to DAGS, which sets forth the names of MICTs and EMTs that Mercy "proposes to work" under the State contract. The public access interest at stake is whether any vendor who proposes to do business with the government possesses qualified professional personnel. This interest is further enhanced, when the personnel will be performing what is perceived as a traditional governmental function, the furnishing of emergency medical services to county residents.<sup>6</sup>

The disclosure of the names of the individuals who Mercy proposes to work under the State contract would also promote governmental accountability and shed significant light upon the decisions and actions of two State government agencies, DAGS and

---

<sup>6</sup>Under section 321-224(2), Hawaii Revised Statutes, the DOH is directed to "[e]stablish emergency medical services throughout the State, which shall meet the requirements of this part, subject to section 321-228." Section 321-228, Hawaii Revised Statutes, provides that the DOH may contract to provide emergency medical services or any necessary component of a county emergency services system in conformance with the state system. It also provides that the DOH shall operate emergency medical ambulance services or contract with a private agency in those counties that do not apply to the DOH to operate their own emergency medical services.

the DOH. Specifically, the award of a contract for emergency medical services in the County of Maui has aroused considerable public interest, attention, and controversy. The strength of the public interest in disclosure is neither enhanced nor diminished by the existence of a community uproar. What is important is that in the absence of the public's access to the names submitted by Mercy to DAGS, the public is deprived of an important means to determine whether DAGS has awarded the contract for emergency medical services to a vendor whose professional staff is qualified to provide such services. Likewise, without access to this information, the public is deprived of a meaningful yardstick with which to measure whether Mercy, the low bidder, has met the minimum requirements established in the IFB, and whether DAGS has awarded the contract to the qualified bidder.

Furthermore, and very importantly, the disclosure of Mercy's list will shed meaningful light upon whether the DOH is responsibly performing its role under chapter 321, Hawaii Revised Statutes, to "establish, administer, and maintain" emergency medical services throughout the State. Haw. Rev. Stat. 321-223 (1985).

Additionally, when the Legislature adopted the UIPA it provided that "[a]ny provision to the contrary notwithstanding, each agency shall disclose the name and business address of any individual holding a license or permit granted by an agency, including the type of license or permit held, and the status of the license. Haw. Rev. Stat. 92F-12(a)(13) (Supp. 1992). Under part II of chapter 453, Hawaii Revised Statutes, the practice of any emergency medical services by an individual who is not licensed to practice medicine or nursing under chapters 453 or 457, Hawaii Revised Statutes, is subject to certification by the Board of Medical Examiners. Thus, the names and business addresses of EMTs and MICTs certified by the Board of Medical Examiners is a matter of public record. See OIP Op. Ltr. No. 92-18 (Sept. 6, 1992) (the term "license" includes "permission granted by a competent authority to engage in a business or occupation or an activity otherwise unlawful").

While individuals who have applied for positions with Mercy may possess a privacy interest in this fact, we believe that in giving due consideration to the policies underlying the UIPA, on balance, the public interest in disclosure of the list of proposed workers submitted by Mercy outweighs the individuals' privacy interests. Accordingly, we conclude that under the UIPA, the disclosure of the list submitted by Mercy would not constitute a "clearly unwarranted invasion of personal privacy."

However, consistent with several previous OIP advisory opinion letters, DAGS and the DOH should not disclose the home addresses, home telephone numbers, or similar personal information relating to individuals on the list, to avoid a clearly unwarranted invasion of personal privacy under section 92F-13(1), Hawaii Revised Statutes.

We now turn to a consideration of whether the list submitted by Mercy is protected under the exception set forth in section 92F-13(3), Hawaii Revised Statutes.

#### IV. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

Under section 92F-13(3), Hawaii Revised Statutes, an agency is not required to disclose "[g]overnment records that, by their nature, must be confidential in order to avoid the frustration of a legitimate government function." In Senate Standing Committee Report No. 2580, dated March 31, 1988, the Legislature clarified this exception by providing examples of information that may be withheld if its disclosure would result in the frustration of a legitimate government function. This committee report provides in pertinent part:

(b) Frustration of legitimate government function. The following are examples of records which need not be disclosed, if disclosure would frustrate a legitimate government function.

. . . .

(3) Information which, if disclosed, would raise the cost of government procurements or give a manifestly unfair advantage to any person proposing to enter into a contract or agreement with an agency, including information pertaining to collective bargaining; . . . .

S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988).

Generally, the disclosure of a list of a vendor's professional or skilled personnel submitted to the State would not result in the frustration of a legitimate government function. However, the facts surrounding this IFB are quite unique. The OIP is informed that the pool of qualified MICTs and

EMTs within the State of Hawaii is very limited. Indeed, most MICTs and EMTs residing in Maui County currently are employed by ILS, Mercy's competitor in the bidding process. We also are informed that the IFB to supply emergency medical services to the County of Maui was structured into three separate steps with this factor in mind, so that new service providers would be given a reasonable and fair opportunity to compete for the new contract.

That is, an evaluation of whether the bidder had qualified employees would come after the selection of the lowest responsible bidder in order that an entity not presently employing MICTs and EMTs in Maui County could nonetheless submit a bid and recruit personnel at a later stage in the bid process.

Documentary evidence submitted for the OIP's review by your office, including an unsigned letter from an unidentified current ILS employee, may indicate that there is some evidence to suggest that pressure has been exerted upon current ILS employees not to sign with Mercy. Reports of alleged intimidation and harassment have also been reported by the news media.

In the event that public disclosure of the list of Mercy's EMTs and MICTs would discourage or dissuade individuals from applying for positions with Mercy, for fear of retaliation by ILS, their current employer, we believe that DAGS might be authorized, under these unique facts, to withhold the list, on a temporary basis, to prevent Mercy's disqualification from the bidding process. In the presence of credible and reliable evidence to suggest that individuals would be dissuaded or discouraged from applying for positions with Mercy, the low bidder, out of fear of retaliation by their present employer,<sup>7</sup> we believe that the disclosure of the list may "raise the cost of government procurements." Specifically, to the extent that the low bidder in response to DAGS' IFB cannot recruit qualified personnel due to fear that disclosure of the list may cause Mercy applicants to lose their present employment, disclosure of the list might increase the cost of government procurements by disqualifying the low bidder. If that happened, the bid might be awarded to the next lowest bidder, ILS, which would cost the State \$443,864 more than the Mercy bid.

---

<sup>7</sup>The OIP is informed that the new emergency medical services contract for the County of Maui is not scheduled to go into effect until October 1, 1993. Thus, if ILS employee have applied for positions with Mercy, and lose their employment as a result of this fact, it is conceivable that these individuals could be unemployed for several months.

However, evidence concerning alleged threats of termination and intimidation is conflicting at best. For example, the OIP has received signed letters from several individuals who have applied with Mercy and who are currently employed by ILS, stating that ILS has not threatened or coerced them in any manner. The OIP has also received unsolicited telephone calls from several current ILS employees who have represented that no pressure has been exerted upon them by ILS. Additionally, in a letter to the OIP dated June 3, 1993, Alan S. Konishi, the attorney for ILS stated:

The purpose of this letter is to state for the record that regardless of whether ILS is awarded the Maui EMS contract, it will not take any punitive actions against current employees who have committed or expressed an interest to work for [Mercy]. First and foremost, ILS is [a] partially owned by its employees . . . . Regardless of which bidder wins the Maui contract, ILS will still operate a sizeable operation on Oahu and Kauai. ILS will not jeopardize its reputation and standing with its owner/employees and in the community by engaging in punitive action against the Maui employees. Additionally, it is not in the interest of ILS to engage in such activity because, as [Mercy] has discovered, the pool of qualified and duly certified EMS personnel in Maui County is not large, and it would be difficult for ILS to continue providing service until September 30, 199[3] if it engaged in retaliatory acts against owners/employees.

Letter from Alan S. Konishi to Kathleen Callaghan, Director of the Office of Information Practices at 2 (June 3, 1993).

Of critical importance, is the fact that on June 2, 1993, Mercy did indeed submit to DAGS a two page list of MICTs and EMTs proposed to work under the State contract. The list contained a total of 32 names of MICTs and 32 names of EMTs, and was accompanied by copies of each individual's certification as an MICT or EMT, and other documents required by the IFB. This strongly suggests that individuals have not been deterred from applying for positions with Mercy as MICTs and EMTs.

In adopting the UIPA, the Legislature declared that "it is the policy of this State that the formation and conduct of public policy--the discussions, deliberations, decisions, and actions of government agencies--shall be conducted as openly as possible." Haw. Rev. Stat. 92F-2 (Supp. 1992). Given this declared public policy, consistent with standards of review established by state and federal courts, we have opined that the UIPA's exceptions must be narrowly construed and applied with all doubts being resolved in favor of disclosure. See OIP Op. Ltr. No. 89-16 (Dec. 27, 1989); OIP Op. Ltr. No. 90-3 (Jan. 18, 1990); and OIP Op. Ltr. No. 91-15 (Sept. 10, 1991); U.S. Dep't of Justice v. Landano, \_\_\_ U.S. \_\_\_, 1993 WL 169155 (May 24, 1993). As such, the application of the UIPA's exceptions should not rest upon tenuous, conclusory, or speculative arguments.

In light of the above, we do not believe that the list submitted by Mercy is a government record that "must be confidential in order to avoid the frustration of a legitimate government function." Haw. Rev. Stat. 92F-13(3) (Supp. 1992).

Since (1) Mercy has apparently successfully fielded well above the minimum number of personnel required by the IFB, (2) ILS' legal counsel has assured the OIP in writing<sup>8</sup> that no punitive employment action will be imposed upon ILS employees whose names appear on the list, and (3) there is an absence of persuasive and credible evidence to substantiate alleged intimidation and coercion by ILS, it is our opinion that DAGS' or DOH's disclosure of the list will not raise the cost of government procurements by disqualifying the low bidder. Consequently, the legitimate government function of obtaining competitive bids has not been frustrated.

Finally, with regard to the timing of the disclosure of Mercy's list, its disclosure before a Notice of Contract Award has been issued will not result in the frustration of a legitimate government function. The agencies involved have evaluated materials submitted in Steps 1 and 2 of this bidding process, and publicly announced the results. The last remaining element for consideration is the evaluation of whether the list submitted by Mercy meets the requirements of the IFB. Disclosure of the list at this time will not result in the frustration of that evaluation process.

Accordingly, it is our opinion that the list submitted to

---

<sup>8</sup>We note that the June 3, 1993 letter from Alan S. Konishi, attorney for ILS, to OIP Director Kathleen A. Callaghan is on file at the OIP and is a public record.

Kenneth K. Fukunaga, Esq.  
November 24, 2003  
Page 15

DAGS by Mercy constitutes "government purchasing information," under section 92F-12(a)(3), Hawaii Revised Statutes, which is not protected by any of the exceptions in section 92F-13, Hawaii Revised Statutes. Therefore, under section 92F-11(b), Hawaii Revised Statutes, the list must be made available for inspection and copying.

### CONCLUSION

For the reasons discussed above, it is our opinion that the list of MICTs and EMTs submitted by Mercy to DAGS on June 2, 1993 is a government record that must be made available for public inspection and copying upon request. Specifically, we conclude that the list constitutes government purchasing information under section 92F-12(a)(3), Hawaii Revised Statutes, and that none of the exceptions in section 92F-13, Hawaii Revised Statutes, would permit DAGS or the DOH to withhold public access to the list.

Please contact me at 586-1404 if you should have any questions regarding this opinion letter.

Very truly yours,

Hugh R. Jones  
Staff Attorney

APPROVED:

Kathleen A. Callaghan  
Director

HRJ:sc  
Attachment

c: Honorable Robert Takushi  
Comptroller

Honorable John C. Lewin, M.D.  
Director of Health

Honorable Robert A. Marks  
Attorney General

Russell Suzuki

Kenneth K. Fukunaga, Esq.  
November 24, 2003  
Page 16

Deputy Attorney General

Alan S. Konishi, Esq.